

PUBLIC UTILITIES COMMISSION

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November 9, 1993

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Donna R. Searcy
Secretary
Federal Communications Commission FCC - MAIL ROOM
1919 M Street, N.W.
Washington, D.C. 20554

Re: PP Docket No. 93-253

Dear Ms. Searcy:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. Levine
Attorney for the People of
the State of California and
the Public Utilities Commission of
the State of California

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of
Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

PP Docket No. 93-253
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NOV. 10 1993

FCC - MAIL ROOM

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit their comments in the above-referenced docket.

In its Notice of Proposed Rulemaking ("NPRM"), the Federal Communications Commission ("FCC") has requested comments on proposals for implementing competitive bidding procedures for awarding licenses for commercial mobile services, including personal communications services ("PCS"), as prescribed in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). By these comments the CPUC will specifically address issues related to rural telephone companies, small businesses, and women and minority-owned businesses.

In the Budget Act, Congress, among other things, has expressly indicated its desire that the FCC adopt regulations that promote both "economic opportunity and competition...by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women." House Report No. 103-111 at p. 581.

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Congress further stated that federal regulations governing competitive bidding for valuable spectrum should "ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process." Id. at p. 582. In order to further these aims, the CPUC offers the following comments on FCC proposals designed to further the participation of these designated entities in competing for PCS and other licenses.

A. Setting Aside Blocks of Spectrum

As a practical matter, rural telephone companies, small businesses and women and minority-owned businesses will likely bid only for the smallest blocks of spectrum allocated in the FCC's PCS Order.¹ These blocks are for 10 MHz and 20 MHz in basic trading areas.

The CPUC shares the concern expressed by Commissioner Barrett in his dissent to that order that the smaller blocks for the above-designated groups may prove less competitive against other PCS service providers. If the FCC intends to provide economic opportunities to such groups, the CPUC believes that

1. Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd ____ (Sept. 23, 1993) ("PCS Order").

there should be a set-aside opportunity for all sized blocks, including the largest ones.

B. Upfront Payments Required of Prospective Bidders

At paragraph 102 of its NPRM, the FCC proposes to require a substantial deposit from prospective bidders in order to ensure that only serious, financially-qualified bidders competitively bid for licenses. The FCC further proposes to calculate the amount of the deposit based on the amount of spectrum and population covered by the license. As an example, the FCC states that at 2 cents per MHz per pop, a bidder for a 20 MHz license for a market population of 20 million would need to deposit \$8 million in order to bid. NPRM at ¶103.

With respect to small businesses or women and minority-owned businesses, the CPUC urges the FCC to consider accepting a reduced deposit, or waive the deposit requirement altogether. Although the FCC's proposed mechanism for calculating the deposit amount may not create a barrier for participation by rural telephone companies in markets where the population is sparse, such mechanism may negatively impact small business, as well as women and minority business, participation in large urban areas with large populations. Lowering or waiving the deposit requirement for these groups in appropriate cases might foster congressional intent not to exclude set-aside participants from the competitive bidding process.

C. Payment for Licenses

In the Budget Act, Congress specifically provided that the FCC consider alternative payment schedules, including installment payments, that promote the objectives the act. The CPUC supports the FCC's proposal to allow installment payment methods for designated groups that "are likely to have difficulty obtaining adequate private financing." NPRM at ¶69. However, while installment payments with interest and/or tax certificates may reduce barriers to participation by designated groups, it may be necessary to develop additional payment alternatives. The CPUC proposes utilizing a percentage of revenues generated from the auction of non-set aside spectrum blocks to finance license payments for designated entities.

D. Unjust Enrichment

In paragraph 84 of the NPRM the FCC proposes specific provisions "to prevent unjust enrichment for licenses obtained in auctions where members of designated entities have participated" pursuant to provisions tailored to ensure that these entities have the economic opportunity to meaningfully participate in acquiring licenses.

The CPUC does not wish to impose a prohibition on resale. However, the CPUC favors transfer disclosures, payment schedules, and stringent antitrafficking restrictions to minimize unjust enrichment. If the congressional objectives of promoting economic opportunity and competition are to be met, aftermarket activities should be monitored for potential abuses, particularly

in connection with set-asides. Closer scrutiny in connection with set-asides is crucial because, by providing alternative payment methods to designated groups, the government could, in effect, encourage re-sale of licenses and consequent windfall gains for individuals with no intent of serving the public. Hence, California recommends that the FCC formulate substantial penalties in such instances.

E. Women and Minority Ownership and Control

In California, the CPUC requires that businesses qualifying under the goal-oriented women, minority, and service disabled veteran-owned business enterprises (WMDVBEs) procurement program are 51% owned and have management and daily operations controlled by one of the aforementioned group members. If a publicly owned business, at least 51% of the stock must be owned by a group member.

In addition, the CPUC's General Order 156, outlining the WMDVBE program, requires that a separate entity verify that businesses credited toward procurement goals do, in fact, meet the established eligibility criteria. The verification process entails the thorough review of an application package with necessary supporting documents demonstrating evidence of ethnic and gender status as well as ownership, management, and control. Verification processing can be completed within 45 days of receipt of a complete application package, and verification is valid for three years, provided there are no changes in the qualifying ownership and control of the enterprise.

This verification has worked well and could provide a model for the FCC in verifying eligibility by designated groups for various measures proposed by the FCC.

F. Safeguards

The CPUC supports safeguards that ensure that bidding process remains competitive and free of collusion and manipulation. Thus, the CPUC strongly supports all efforts by the FCC to adopt rules that prohibit potential bidders from collaborating, sharing information, or otherwise discussing with one another any information regarding the substance of bids or bidding strategies prior to the completion of the auction.²

The CPUC believes that the above prohibition will ensure that the federal government receives the greatest revenue from the auction. Such safeguards will eliminate opportunities for bidders to predetermine which licenses they will bid for and what price they will pay.

More importantly, competition in the wireless market will have a greater chance of developing. If bidders are allowed to collaborate on how to distribute licenses, then licenses may be auctioned off in such a manner that strengthens a provider's dominance in an area in such a way that competitive pressures are diminished.

2. The CPUC, however, does not oppose good-faith formation of partnerships for the purpose of bidding for PCS licenses.

With respect to enforcement mechanisms, the CPUC recognizes the difficulty in finding resources to police rules and regulations. Thus, the CPUC advocates a "nuclear deterrence" approach -- any bidders found to have or attempted to have colluded should be stripped of any license(s) received and fined investigative costs. Since it is unclear what level of protection current law provides or whether it provides adequate protection, the above safeguards should be made cumulative to existing law.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN LEVINE

By:



Ellen S. Levine


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Utilities Commission of the
State of California

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Dated: November 9, 1993

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 9th day of November, 1993 a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA was mailed first class, postage prepaid to all known parties of record.



Ellen S. LeVine